No. 13672

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY J. COFFMAN,

Appellant,

vs.

COBRA MANUFACTRING COMPANY,

Appellee.

BRIEF OF APPELLANT

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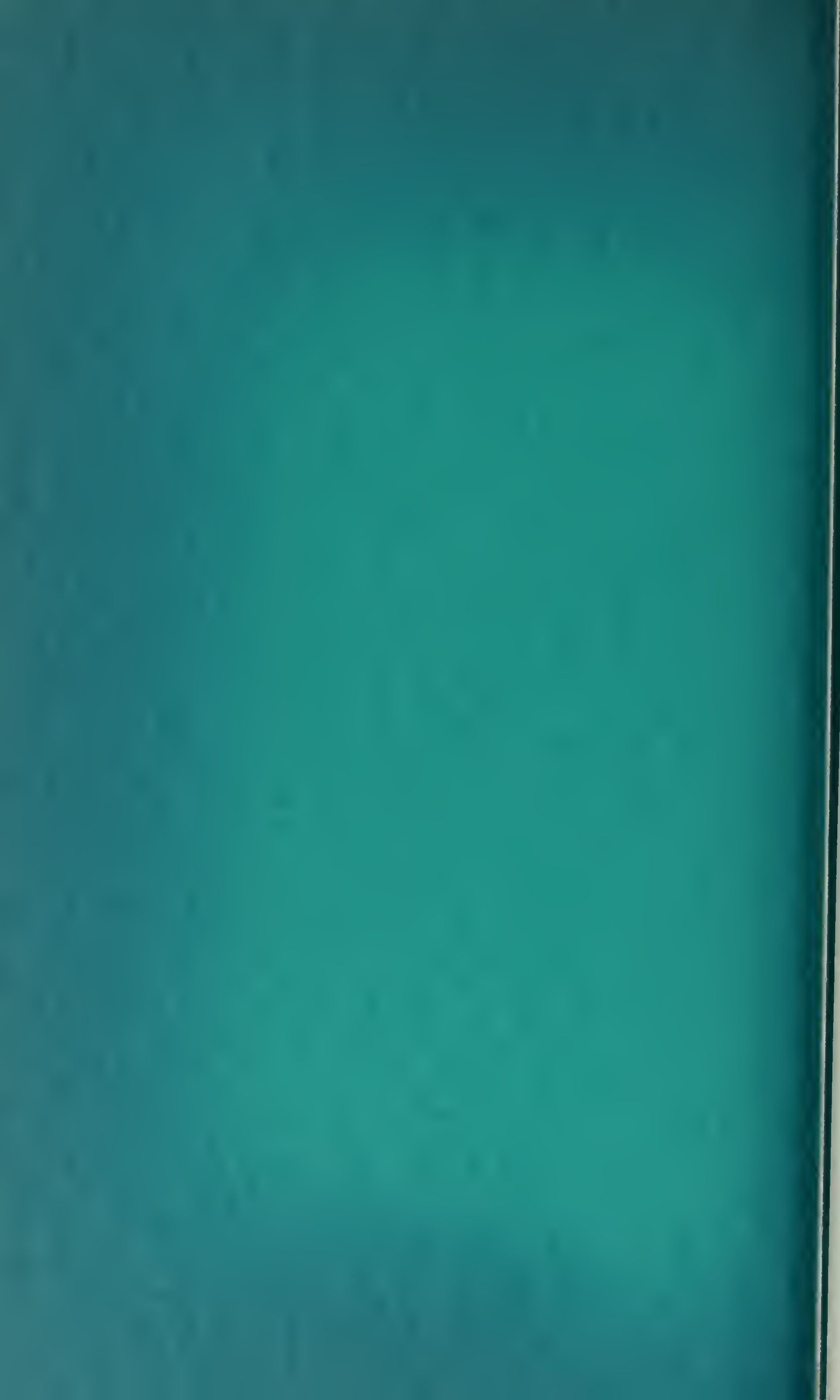

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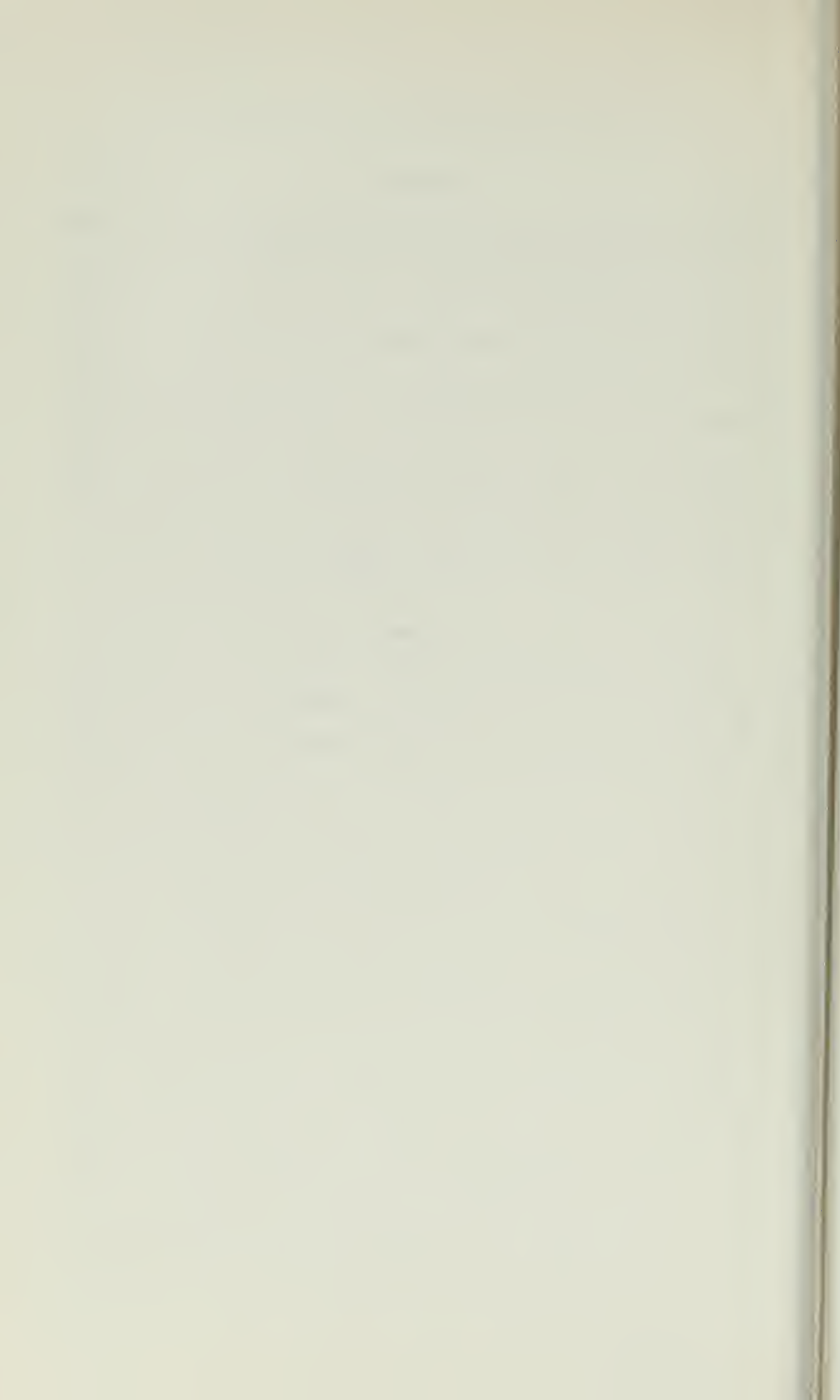

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Cobra Manufactring Company,

Appellee.

BRIEF OF APPELLANT

Preliminary Statement.

From an Order adopting an approving Original and Supplemental Reports of a Special Master, in proceedings supplemental to execution, made by the District Court for the Southern District of California, Central Division, the Honorable Peirson M. Hall, Judge Presiding, appellant Harry J. Coffman prosecutes this appeal.

Statement of Pleadings and Facts Disclosing Jurisdiction.

(1) The statutory provisions sustaining the jurisdiction of the District Court of the United States are found in Federal Rules of Civil Procedure, Rule 69(a).

Jurisdiction of this Court is based upon Title 28, U. S. Code, Section 1291; and Title 11, U. S. Code, Section 47.

(2) The pleadings in this case consist of an Affidavit for Order of Appearance of Judgment Debtor and Others, in which it is recited that a judgment was entered in favor of Cobra Manufacturing Company against California Aircraft Engineering Company in the District Court in the sum of $6,254.25; that execution had been returned unsatisfied; that appellant had property of the judgment debtor and was indebted to the judgment debtor in an amount exceeding $50.00. An order was sought by the judgment creditor for the examination of appellant concerning any property of or indebtedness to the said judgment debtor California Aircraft Engineering Company [R. 27-29].

Statement of the Case.

In March, 1946, Cobra Manufacturing Company (herein designated as "Cobra") filed a petition seeking an arrangement under Chapter XI of the Bankruptcy Act [R. 3]. During the course of the proceedings California Aircraft Engineering Company (herein designated "Aircraft Company") filed a claim for $1,868.16, to which objections were filed by the debtor in possession upon several grounds, including a claim that Aircraft Company was indebted to Cobra in the sum of $6,254.25 [R. 5-6]. The claim of Aircraft Company and the objections of Cobra thereto were heard by a Referee in Bankruptcy, who found against the claim and in favor of the counterclaim and made an Order reading as follows:

> "It is Hereby Ordered, Adjudged and Decreed that California Aircraft Engineering Co. has no claim against the above-entitled estate and that their claim should be disallowed.

> "It is Further Ordered, Adjudged and Decreed that California Aircraft Engineering Co. is indebted to Cobra Manufacturing Corporation for the sum of Six Thousand Two Hundred Fifty-four and 25/100 Dollars ($6,254.25)." [R. 8-11.]

The Order so made by the Referee was affirmed by the District Court upon Petition for Review by its judgment stating as follows:

> ". . . It is Ordered, Adjudged, and Decreed that the Referee's Findings of Fact, Conclusions of Law and Order, entered on the 20th day of May, 1947, be and the same is hereby affirmed." [R. 5.]

Execution on this judgment having been returned unsatisfied, proceedings supplemental to execution were instituted and an Order was made for the examination of appellant Harry J. Coffman (herein designated as "Coffman") [R. 12, 25, 30, 31]. A Special Master was appointed to take the testimony and to make his report, findings and conclusions to the Court [R. 31-34].

At the hearing before the Special Master the following facts were developed:

The judgment which Cobra had obtained against Aircraft Company was for services rendered and materials furnished between May, 1945 and April, 1946 [R. 8-10, 257-258].

Aircraft Company had been incorporated in the year 1943 as a California corporation, its principal purpose being to engage in war work, that is, the assemblying of aircraft components [R. 130]. Coffman, his wife and daughter owned all of the outstanding 250 shares of the corporation, Coffman owning 150 shares, his wife 50 shares, and his daughter 50 shares [R. 131, 170]. At all

times since its organization Coffman has been President and Director of Aircraft Company.

Aircraft Company had two plants, one located on Pico Boulevard and the other on LaBrea Boulevard, in Los Angeles [R. 194]. The LaBrea premises were held under a lease executed to the company and to Coffman jointly, as co-lessees [R. 183-184].

With the coming of V-J Day in 1945, and the consequent cancellation of aircraft contracts, the war work in which Aircraft Company had been engaging came to an end [R. 179, 193, 194]. In order to comply with the terms of the lease which became operative at the cessation of hostilities, and at the expense of several thousand dollars to himself, Coffman dismantled the manufacturing facilities which had been installed on the premises at La Brea Boulevard and restored the building to its original condition, that is as an automobile sales agency [R. 195, 196, 199, 204].

Both Aircraft Company and Coffman thereupon made use of the reconverted premises for business purposes. For a few months Aircraft Company operated an automobile agency therein, distributing Willys Jeep automobiles and conducting a general garage business [R. 197, 209, 210, 216]. The general management of Aircraft Company then passed from Coffman to the Vice-President of the company, a man named E. E. Brown, who was experienced in the manufacture of vending machines [R. 236, 237]. Aircraft Company thereupon devoted its activities to the business of developing vending machines, an iron lung, a portable tractor, a certain type of spark plug and various other items for civilian use [R. 8-10, 179, 236-237].

In November, 1945, Coffman obtained a Nash automobile distributorship in Los Angeles and established a sales agency at the LaBrea premises, where he did business under the name of Nash-Wilshire [R. 190]. In the conduct of the Nash agency Coffman opened commercial accounts at the same banking institutions where Aircraft Company had its accounts. One such account was established by Coffman at Hollywood State Bank in 1945. The other was opened at Bank of America in December, 1945 [R. 140, 143]. At no time were funds belonging to Aircraft Company transferred to Nash-Wilshire accounts [R. 140-141].

In October, 1945, the net worth of Aircraft Company as appeared upon its books was in the sum of approximately $20,000.00 [R. 194; Ex. "2"]. The net worth was not distributed to anyone, the assets represented thereby became worthless after the war was over [R. 239-240].

The books and records kept in the ordinary course of business of both Nash-Wilshire and Aircraft Company disclosed the following: In May, 1945, Aircraft Company owed Coffman approximately $12,500.00. This sum was reduced by loans, advances and withdrawals in favor of Coffman and was finally liquidated by December, 1945. Thereafter, during 1946 and 1947 Coffman's indebtedness on the books to Aircraft Company amounted to the maximum sum of $9,240.00, while Aircraft Company's indebtedness to Coffman increased to the sum of $12,-207.00, leaving a net balance in favor of Coffman in the sum of $2,966.00. The net indebtedness shown by the books and records of Aircraft Company and Nash-Wilshire was in favor of Coffman to the amount of

$2,966.93 at all times from and after September, 1949 [R. 65-66].

At the conclusion of the hearings in which the foregoing facts were developed the Special Master filed with the District Court his Report and Findings, in which he concluded and recommended that Coffman be ordered to pay to Cobra the amount of Cobra's judgment against Aircraft Company [R. 47, 53]. Thereafter Coffman filed Exceptions to the Findings of the Special Master, which resulted in an Order of Reference being made to the Special Master for the purpose of determining whether Aircraft Company was indebted to Coffman, as set forth in its books and records [R. 58-80].

Without the taking of further testimony or evidence (neither side offering the same) the Special Master made his Supplemental Report, Findings of Fact and Conclusions of Law, under which it was found that Aircraft Company was not indebted to Coffman as set forth in the books of Aircraft Company, and in which it was concluded that Coffman's denial of his indebtedness to Aircraft Company was not in good faith and that he was not entitled to an offset in the amount of the indebtedness claimed by him against Aircraft Company [R. 80-93]. Coffman thereupon applied to the Court to reject the Supplemental Report, Findings of Fact and Conclusions of Law, upon written objections thereto [R. 94-100].

This application was denied and a formal Order was thereupon made by the Court adopting and approving the Report and Supplemental Report of the Special Master, and ordering Coffman to pay to Cobra the sum of $6,-254.00, the amount of Cobra's judgment against Aircraft Company [R. 123-125].

Specification of Errors.

(1) The Court erred in making and rendering its Order for Appearance and Examination of Judgment Debtor and Others [R. 30-31]. The ground of said specification of error is that the judgment upon which said Order is based is void.

(2) The Court erred in making and rendering its Order Appointing United States Commissioner Howard V. Calverley as Special Master, vesting said Master with the powers specified in said Order [R. 31-33]. The ground of this specification of error is that the judgment upon which said Order is based is void.

(3) The Special Master erred in making the following Findings of Fact in his Report and Findings of Special Master:

> 1. "That Harry J. Coffman as dominant and controlling stockholder and president of the California Aircraft Engineering Company, a California corporation, at the time the debt arose between said corporation, and at the time the judgment was entered herein, occupied a fiduciary relationship toward the Cobra Manufacturing Company, a creditor of said California Aircraft Engineering Company;" [R. 52].

The foregoing Finding of Fact is specified as being erroneous for the reason that there is no evidence that at the time the debt arose or at the time the judgment was entered Coffman occupied a fiduciary relationship toward Cobra or which was in any manner violated.

> 2. "That from May 1, 1945, to and including June 30, 1948, Harry J. Coffman appropriated funds of the California Aircraft Engineering Company to his own use and benefit, said funds totalling $9,-240.46;" [R. 52].

The foregoing Finding of Fact is specified as being erroneous for the reason that there was no evidence that Coffman appropriated funds of Aircraft Company to his own use and benefit in the amount of $9,240.46, or any other sum. The evidence was to the effect that such funds totaling $9,240.46 were loans and advances of Aircraft Company to Coffman [see Account No. 180 of the General Ledger of California Aircraft Engineering Company at pages 43 and 44, received in evidence in the trial court, a photostatic copy of which is attached to page 46 of the Transcript of Record herein].

> 3. "That the appropriation of funds of the California Aircraft Engineering Company by Harry J. Coffman in the total sum of $9,240.46 was wrongful and in breach of trust and directly caused the financial inability of the California Aircraft Engineering Company to pay the judgment obtained by the Cobra Manufacturing Company on November 5, 1947, in the sum of $6,254.25;" [R. 53].

The foregoing Finding of Fact is specified as being erroneous for the reason that there is no evidence whatsoever that the loans or advances of funds from Aircraft Company to Coffman were wrongful or a misappropriation or a breach of trust or directly or otherwise caused the inability of the Aircraft Company to pay the judgment of Cobra.

> 4. "That Harry J. Coffman is indebted to the California Aircraft Engineering Company, a California corporation, in the sum of $9,240.46" [R. 53].

The foregoing Finding of Fact is specified as being erroneous for the reason that it is contrary to and not supported by the evidence; the General Ledger of Aircraft

Company shows that ever since October 31, 1947, and long prior to the hearings involved in this case Aircraft Company was indebted to Coffman in the sum of approximately $2,966.00 over and above all offsets. [See photostatic copy of Account No. 99-6 showing a total indebtedness of Aircraft Company to Coffman in the sum of $12,207.39 [R. 66].]

> 5. "That Harry J. Coffman does not deny, in good faith, that he is in debt to the California Aircraft Engineering Company, a California corporation, in the sum of $9,240.46." [R. 53.]

The foregoing Finding of Fact is specified as being erroneous for the reason that said finding is contrary to and not supported by the evidence at the hearings, said evidence showing that Coffman at the hearings before the Special Master produced books and records of Aircraft Company showing it to be indebted to Coffman in excess of the amount of Coffman's indebtedness to the Aircraft Company in the sum of $2,966.00, as aforesaid, and by Coffman's Exceptions and Objections to said finding made in the District Court [R. 63-64] and the Order of Re-reference by the Court upon said objections [R. 77-80].

(4) The Special Master erred in making his Conclusion of Law that:

> ". . . Harry J. Coffman should be ordered by the District Court to pay to the Cobra Manufacturing Company, a corporation, the sum of $6,254.25, the amount of the judgment which the Cobra Manufacturing Company has obtained against the California Aircraft Engineering Company, together with interest at the rate of 6% from the date of judgment, namely, November 5, 1947, and costs." [R. 53.]

The foregoing Conclusion of Law is specified as being erroneous for the reason that it is not supported by the Findings of Fact nor by the evidence, as is hereinabove indicated in Specification of Errors 1, 2, 3, 4 and 5.

(5) The Special Master erred in making the following Supplemental Finding of Fact:

> "It is not true that the California Aircraft Engineering Company, a corporation, was indebted to Harry J. Coffman in the sum of $12,207.39 on June 30, 1948, as set forth in the books and accounts of said Aircraft Company and as would appear from Exhibit B attached to the exceptions to the Report and Findings of the Special Master."

The foregoing Finding of Fact is specified as being erroneous for the reason that there is no evidence whatsoever supporting such finding.

(6) The Special Master erred in making Supplemental Conclusions of Law reading as follows:

> "It is concluded that Harry J. Coffman does not deny his indebtedness to the California Aircraft Engineering Company, a corporation, in the sum of $9,240.46, in good faith and is not entitled to the offset of $12,207.39 claimed by him as appears in Exhibit B attached to the exceptions to the Report and Findings of the Special Master, against the indebtedness of Coffman to the said California Aircraft Engineering Company."

The foregoing Conclusion of Law is specified as being erroneous for the reason that it is not supported by the evidence as is hereinabove indicated as Specifications of Error No. 3.

(7) The Court erred in making its Order Adopting and Approving Original and Supplemental Reports of Special Master Filed October 16, 1951, and March 11, 1952, and Allowing Special Master an Additional Fee of $200.00 [R. 123-125], and in connection therewith erred in overruling:

(1) The objections to Report and Findings of Special Master, the Exceptions and Objections interposed by Coffman [R. 58-65], based upon the ground that said Report and Findings therein were contrary to and not supported by the evidence; and for want of jurisdiction; and

(2) The Exceptions and Objections interposed by Coffman to Supplemental Report, Findings of Fact and Conclusions of Law of Special Master [R. 94-100], based upon the ground that said Supplemental Report, Findings of Fact and Conclusions of Law were contrary to and not supported by the evidence; and for want of jurisdiction.

Summary of Argument.

I.

(1) A Valid and Enforceable Judgment is a Condition Precedent to the Institution of Proceedings Supplemental to Execution.

(2) A Referee in Bankruptcy is Without Power to Render a Judgment Against a Creditor Upon a Counterclaim Interposed to the Creditor's Claim in Excess of the Amount of Such Creditor's Claim.

The claim of Cobra in this proceeding rests upon such a Referee's Order which is void for want of jurisdiction and which, therefore, cannot form the basis of proceedings supplemental to execution.

(3) The Judgment which is the Basis of the Supplemental Proceedings Herein is Not an Enforceable Judgment for Money Upon Which Execution May Issue or for Which Supplemental Proceedings is Authorized.

Such Judgment is a mere finding of the existence of an indebtedness and does not rise to the dignity of a true judgment for the recovery of money by one party to an action against another.

II.

In Proceedings Supplemental to Execution a Denial of the Indebtedness Alleged or the Claim of a Substantial Dispute Thereto Ousts the Court of Jurisdiction to Determine the Existence of the Indebtedness or the Conflicting Claims of the Parties.

The indebtedness of appellant to Cobra was more than offset by the indebtedness of Cobra to appellant, as appears from the books and records of the debtor Aircraft Company.

III.

Assuming, *arguendo,* the Jurisdiction of the Master, His Findings of Fact are Contrary to and Not Cupported by the Evidence and his Conclusions and the Order of Court Based Thereon Are Against Law Because (1) There was No Evidence that Appellant Possessed Property of or Was Indebted to Aircraft Company; and (2) Under Local Law a Court Cannot Order the Payment to a Judgment Creditor of an Indebtedness Alleged to be Due From a Third Person to the Judgment Debtor.

ARGUMENT.

I.

A Valid and Enforceable Judgment Is a Condition Precedent to the Institution of Proceedings Supplemental to Execution.

(1) The general rule is that the recovery and entry of a valid judgment for the payment of money is a condition precedent to the institution of supplementary proceedings 33 C. J. S. *Executions,* Sec. 360, p. 662; *Lineza v. Brinkerhoff,* 29 Cal. App. 2d 1 (83 P. 2d 976).

In this same connection it is established, absent any statute of the United States, that the procedure on executions and supplemental proceedings is governed by local practice and procedure, Rules of Civil Procedure, Rule 69(a); *Bair v. Bank of America Nat. Trust & Savings Ass'n,* 112 F. 2d 247 (C. C. A. 9). No federal statute has been found applicable to the procedure involved in proceedings supplemental to execution; therefore, the California statutes and law govern. The pertinent California Code sections dealing with such subject are found in the Appendix (Calif. Code of Civ. Proc., Secs. 684, 717, 719, 720).

Under these code sections, as above indicated, supplemental proceedings cannot be instituted unless there is a valid and enforceable money judgment which is unsatisfied.

(2) The judgment for which execution was sought in this case and upon which Coffman's examination was predicated has already been set forth at pages 3-4 of this Brief. To recapitulate, it was a judgment entered by a Referee in Bankruptcy upon a counterclaim interposed by the debtor in possession to a creditor's claim filed by Aircraft Company.

It has been held upon numerous occasions in this Circuit that in bankruptcy a referee is without jurisdiction to render a judgment based upon a counterclaim or offset for the excess thereof over the creditor's claim; that such a judgment is void, and that the relief which is thus desired must be obtained in a plenary action. *In re Continental Producing Co.* (D. C. Cal), 261 Fed. 627; *In re Florsheim,* 24 Fed. Supp. 991 (D. C. Cal.); *In re Bowers,* 33 Fed. Supp. 965 (D. C. Cal.).

The foregoing cases clearly hold that the Referee's judgment which was affirmed by the petition for review herein was unauthorized and made and rendered without jurisdiction. Consequently such judgment could not form the basis of an execution or proceedings supplemental to execution.

(3) Critical analysis of the judgment made and rendered by the referee compels the conclusion that it is not such a judgment for recovery of money as permits the issuance of execution thereon; it is merely a finding of the existence of an indebtedness insufficient to sustain the usual process for enforcement. In this respect the order of the referee herein finding that Aircraft Company is indebted to Cobra is on all fours with the order made by the court in the case of *In re Continental Producing Co.,* 261 Fed. 627, *supra.* The court at page 628 of the opinion states:

> "*In this connection, although it is admitted that such a finding would not of itself constitute an enforceable judgment against the creditor,* yet it is urged that such finding would be conclusive against him, and that, in a suit thereafter to be brought upon the alleged overplus that found to be due, he would be estopped from urging any defense other than that of

payment. *Breit v. Moore,* 220 Fed. 97, 99, 135, C. C. A. 573. That is, in any subsequent suit, the merits of the claim would not be inquired into, on the ground that there had been an adjudication had in the matter, and that the same question could not again be litigated. *The net result is that, though the finding of the referee with respect to the counterclaim of the trustee does not, in form, constitute a judgment against the creditor,* yet it does in substance, in that the creditor is estopped to go behind the finding thus made, and the only defense he would have to a subsequent suit brought to secure an enforceable judgment would be the defense of payment made. . . ." (Italics ours.)

Similar holdings are found in the California cases where the subject has been under consideration. In *Bank of America v. Standard Oil Co.,* 10 Cal. 2d 90 (73 P. 2d 903), a judgment was made by the Court in a declaratory relief action ordering a trustee to pay to certain parties 91% of the funds in its possession. On appeal it was held by the Supreme Court of California that this was not a money judgment upon which execution could issue, the Court stating as follows:

". . . This judgment is not a complete determination of the rights of the trustee and the claimants to the fund. As between the trustee and the ranch company it is an adjudication that the latter is entitled to a specified percentage of the net proceeds of the trust fund as against the claims of the defendants who have not appealed from it. But it is not a judgment upon which execution may issue. An execution must refer to the judgment and state 'if it be for money the amount thereof, and the amount actually due thereon.' (Sec. 682, Code Civ. Proc.)"

In *Wellborn v. Wellborn,* 55 Cal. App. 2d 516 (131 P. 2d 48), in a suit for annulment, the Court decreed that the defendant had a $1,250.00 lien on certain real and personal property belonging to the plaintiff. In holding that this was not a judgment upon which execution could issue the Court stated at page 524 as follows:

> ". . . It is interesting to note that in the case at bar, while the judgment established a lien in the sum of $1,250 there were no conditions or time set for the payment of it. All the more reason why execution would not be the proper remedy . . ."

In *Hennessey v. Puertas,* 99 Cal. App. 2d 151 (221 P. 2d 321, in a declaratory relief action relating to the rental due under lease the parties stipulated that judgment should be entered in favor of the plaintiff and against defendant, providing that plaintiff should be entitled to rents from the defendant at a certain monthly rent. Pursuant to the stipulation judgment was entered providing that the defendant pay to plaintiff the specified rents, subject to the terms and conditions of the lease. In holding that this judgment would not sustain execution because it was not a judgment for money, the Court at page 154 of the opinion states as follows:

> ". . . The plaintiff's complaint in the action sought only declaratory relief, with an incidental award of costs and attorney's fees. The stipulation for judgment does not provided that plaintiff shall recover $75 per month from defendant but that 'said plaintiff *shall be entitled to rents* from said defendant for the premises described in said lease' of $75 per month. The inept language of the judgment, that defendant 'pay to plaintiff' $75 per month, cannot control, in view of the record above recited

and the further language of the judgment that such payment is 'subject to the terms and conditions of that certain lease.' The plaintiff by his action sought only declaratory relief; the stipulation for judgment clearly contemplated only declaratory relief; and the judgment itself, while it provides that defendant 'pay . . . to plaintiff,' further provides that such payment is 'subject to' the terms of the lease.

"The only reasonable construction is that the judgment constitutes a declaration of the rights and duties of the parties under the provisions of the lease, and no more . . ."

To the same effect see *McKay v. Coca-Cola Bottling Co.*, 110 Cal. App. 2d 672 (243 P. 2d 135).

Applying the principles specified in the foregoing decisions and in Points (1), (2) and (3) herein discussed, it is manifest that there is absent the essential prerequisite to the sustaining of the jurisdiction of the trial court to proceed herein, namely, the existence of a valid, enforceable judgment against Cobra. The only judgment in this case is the judgment made by the referee, which, as appears from the authorities set forth, was void for want of jurisdiction. On the other hand, even if viewed as being within the powers of the referee, nevertheless, the judgment does not amount to a money judgment for it is no more than a declaration of the existence of an indebtedness. It is not a final determination of the rights of the parties within the meaning of a judgment, as defined by California Code of Civil Procedure, Section 577, as follows:

"A judgment is the final determination of the rights of the parties in an action or proceeding."

II.

In Supplementary Proceedings a Denial of the Indebtedness or Substantial Dispute Thereto Ousts the Court's Jurisdiction to Determine the Existence of the Indebtedness or the Conflicting Claims of the Parties.

Both by code and by the decisions, the law of California is established to the effect that the Court is without jurisdiction to make an order on supplementary proceedings directed against a third person where such third person denies the debt or claims an interest in the property adverse to the judgment debtor.

Cal. Code of Civ. Proc., Sec. 719;

McDowell v. Bell, 86 Cal. 615, 25 Pac. 128;

Lewis v. Chamberlain, 108 Cal. 525, 41 Pac. 413;

Miller v. Superior Court, 82 Cal. App. 634, 256 Pac. 431;

Blake v. Blake, 86 Cal. App. 377, 260 Pac. 937;

Takahashi v. Kunishima, 34 Cal. App. 2d 367, 93 P. 2d 645.

The law on the subject is summarized with particular applicability to the facts of the instant case in *Wulfjen v. Dolton,* 24 Cal. 2d 878, 889, 151 P. 2d 840, where the Court states as follows:

"Appellant, in pursuance of her judgment against the corporation, caused to be served on the respondents Dolton and King a writ of execution, which

was returned by the sheriff '*nulla bona*'; thereafter said respondents were examined in supplementary proceedings, each denied any debt or obligation to the corporation, and each claimed an interest in the property of the judgment debtor adverse to it and to the appellant. *Upon such denial of liability, continued pursuit of the statutory procedure would be of no avail to the appellant,* . . . Proceedings supplementary to execution are wholly inadequate where the grantee or transferee of a judgment debtor asserts title in himself, for the reason that *to make an order directing the application of property claimed by a person in his own right would be to deprive him of his property upon a summary proceeding and without due process of law* . . . Where a judgment creditor claims that title under a conveyance or transfer is invalid, an issue as to such ownership and title should be properly made and tried in an appropriate action in which a judgment may be had and the parties conclusively bound." (Italics ours.)

The principles expressed in the foregoing decisions in California law are clearly applicable to the facts of the instant appeal. Although the evidence in this case showed that Coffman was indebted to Aircraft Company in the sum of $9,240.00, the evidence also affirmatively showed that Aircraft Company was indebted to Coffman in the sum of $12,207.39, and that, therefore, Coffman's obligation to Aircraft Company was more than offset. [R. 40; Account No. 99-6 of Aircraft Company showing in-

debtedness in favor of H. J. Coffman, doing business as Nash-Wilshire, in the sum of $12,207.39.]

In California where facts are proved on behalf of the party examined in supplementary proceedings showing that the indebtedness alleged is non-existent, or that it is disputed or offset, the Referee loses summary jurisdiction.

> *Miller v. Superior Court,* 82 Cal. App. 634, 256 Pac. 431.

Proof of the account [R. 40] showing the offset in favor of Coffman was, therefore, sufficient to divest the Court of power to make an order in the proceedings directed against Coffman.

Under the facts as herein set forth and the cited authorities, the Special Master committed error in making his Findings of Fact in the original and supplementary reports and the Conclusions of Law therein specified, and the Court erred in adopting the same for the reason that upon the presentation of substantial evidence of a denial of or dispute as to the indebtedness between Coffman and Aircraft Company, the judgment creditor's only remedy was to institute a plenary action at law.

III.

Assuming, Arguendo, the Jurisdiction of the Master, His Findings of Fact Are Contrary to and Not Supported by the Evidence and His Conclusions and the Order of the Court Based Thereon Are Against Law Because (1) There Was No Evidence That Appellant Possessed Property of or Was Indebted to Aircraft Company; and (2) Under Local Law a Court Cannot Order the Payment Creditor of an Indebtedness Alleged to Be Due From a Third Person to the Judgment Debtor.

In approaching this phase of the argument, the attention of the court is respectfully directed to its opinion in *Adams v. Northern Pacific Railway Company,* 115 F. 2d 768, 779 (C. C. A. 9), where it is stated as follows:

> "The Railway Company contends that our power to review the decision of the lower court predicated upon the master's report is restricted by rule 53(e) (2) of Civil Procedure, 28 U. S. C. A. following section 723c, which reads as follows: 'In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous.' *This rule, of course, regulates the conduct of the trial judge and not that of the appellate court.* It is not a new rule but a restatement of an old and well-established rule. *Camden v. Stuart,* 144 U. S. 104, 12 S. Ct. 585, 36 L. Ed. 363; *Girard Ins. Co. v. Cooper,* 162 U. S. 529, 16 S. Ct. 879, 40 L. Ed. 1062. It is sufficient for the purpose of this case to say that we are not dealing with a question of specific findings of fact based upon the testimony of

> witnesses whose credibility is to be determined by the master and trial court but with a series of inferences predicated upon admitted facts resulting in ultimate conclusions as to value." (Italics ours.)

In determining whether the evidence is sufficient to sustain a finding on appeal, it is held in *Pallma v. Fox,* 93 F. Supp. 134, 139 (Dist. Col.); *Kenny v. Washington Properties,* 128 F. 2d 612 (C. C. A., Dist. Col.):

> "In order to make a finding from an inference, the inference must be based on probability and not possibility and must be reasonably drawn from and supported by the facts on which they purport to rest, and may not be the result of mere surmise and conjecture. There must be facts proved from which the inference can be drawn and an inference of fact may not be drawn from a premise which is wholly uncertain."

(1) There Was No Evidence That Appellant Possessed Property of or Was Indebted to Aircraft Company.

Bearing in mind the foregoing principles dealing with the sufficiency of the evidence examination of the record in this case shows that there was a total absence of any evidence indicating that appellant possessed property of or was indebted to Aircraft Company.

In making his Findings and Conclusions in favor of Cobra, the Special Master adopted Cobra's contentions that Coffman was a fiduciary with respect to the creditors of Aircraft Company, that he was required to account to them for the use of corporate funds, that he was not entitled to use such funds for his own benefit to the detriment of other stockholders and creditors of the corporation, that after the war he appropriated the assets

of Aircraft Company to finance Nash-Wilshire and that this transfer stripped Aircraft Company of all of its property and made it impossible for it to pay the judgment [R. 49-50]. Furthermore, without taking any evidence whatsoever, the Special Master on the Order of Rereference held that the books and records of Aircraft Company showing the $12,207.00 in favor of Coffman were not entitled to credit because the account upon which it was based lacked "integrity" [R. 91-92]. These findings by the Special Master which went into his report and which were adopted by the Court were clearly based upon speculation and were contrary to the evidence submitted in the case.

The singling out by the Special Master of that portion of the books and records of Aircraft Company establishing a net credit and offset in favor of Coffman in the sum of $12,207.00 as lacking "integrity" cannot be justified in view of the presumptions of regularity created by the Uniform Business Records as Evidence, Act, which is part of the law of California (Cal. Code Civ. Proc., Sec. 195(e), (f), (g), (h)).

The entries in the books of Aircraft Company are *prima facie* evidence of liability amounting to admissions against it. *Wallace v. Oswald,* 57 Cal. App. 333 (207 Pac. 51). Further, in none of the proceedings before the Special Master was the Nash-Wilshire account on the books of Aircraft Company challenged. This account is contained in the same books and records of Aircraft Company containing Account No. 180, the basis for the claim that Coffman is indebted to Aircraft Company in the sum of $9,240.00, as appears from the analysis introduced in evidence as Exhibit "9".

It is impossible to see how one account, namely Account No. 180, of Aircraft Company, possesses "integrity" while the other account, No. 99-6, lacks "integrity".

Nor did Aircraft Company cease doing business in 1945. Aircraft Company continued in business after 1945, devoting its activities not only to the sale of jeeps, but to the development of vending machines, portable tractors, iron lung, spark plug and other items, and in connection therewith maintained an active business requiring payroll accounts [R. 8-10, 179, 236-237].

There is no evidence whatsoever that the assets of Aircraft Company were misappropriated by Coffman or used by him in connection with his businesses or that any cash belonging to Aircraft Company was used in the establishment or operation of Nash-Wilshire. The evidence was to the contrary. Cobra's own witnesses established that the funds in the bank accounts belonging to Aircraft Company never were transferred to Nash-Wilshire [R. 140-141].

From the foregoing analysis of the facts of this case, the conclusion is inescapable that there was a total want of proof of any indebtedness in favor of Aircraft Company by Coffman on the possession of any funds, property or other assets belonging to Coffman by Aircraft Company. Furthermore, the mere fact that Coffman may have received payments by way of loans and advances between 1945 and 1946, as indicated by creditor's Exhibit "9", amounting to the sum of $9,240.00 does not indicate that he had such funds in his possession at the time of the hearings herein. In *Hammer v. Downing*, 66 Pac. 916 (Ore.), the Court held that a finding of present possession of money could not be supported by proving that the debtor had such sums within three

months from the date of the hearing. In the instant case the last payment by Aircraft Company to Coffman occurred more than two years prior to the hearings. There is clearly no evidence that Coffman possessed any funds of and certainly no property of Aircraft Company was shown to be in his possession.

There is likewise no evidence whatsoever to support the Special Master's Supplemental Conclusion of Law that Coffman does not deny his indebtedness to Aircraft Company in good faith and is not entitled to the offset claimed by him [R. 81]. Continuously at the trial level Coffman maintained that he was entitled to the offset which the books and records of Aircraft Company and Nash-Wilshire showed him to be entitled to.

In Briefs filed before the Special Master [R. 50-51]; in Exceptions to the Report and Findings of Special Master [R. 61-66]; in Application to Reject Supplemental Report, Findings of Fact and Conclusions of Law of Special Master [R. 94-100]; and Motion for Leave to Re-argue Objections and to Reconsider Ruling [R. 103-104] Coffman asserted his right to the offset claimed and the denial of any indebtedness to Aircraft Company.

The principle involved here akin to the rules applicable to a Referee in Bankruptcy exercising jurisdiction against an adverse claimant. On this particular point the law summarized in 2 Collier on Bankruptcy, Sec. 23.06, p. 502 as follows:

> ". . . Where property is in possession of a third person holding under an alleged preferential transfer, or an alleged fraudulent transfer, such fact will not entitle the bankruptcy court summarily to order its delivery, and the claimant is entitled to a plenary suit. It does not follow that because the property

was allegedly transferred within the prohibited period in such a way as to constitute a preference or fraudulent transfer, that the transferee may be subject to summary jurisdiction; he may have a valid claim notwithstanding the transfer. Nor may a claimant be directed summarily to surrender property in his possession upon the mere allegation that the claimant's interest is not in good faith and that the trustee or receiver intends to attack the claim on the ground that it is preferential or fraudulent. . . ."

At page 510 the author continues:

"Whether or not a claim is adverse so as to defeat summary jurisdiction depends upon whether the claim is substantial and real, or merely colorable. An adverse claim is substantial if the evidence offered as a basis is sufficient, if uncontroverted, to establish the validity of a claim; but a claim is not to be deemed merely colorable, so as to give the bankruptcy court summary jurisdiction, if its validity depends upon disputed facts as to which there is a conflict of evidence as well as a controversy in matter of law. . . ."

These principles, it is submitted, apply here. At all times there has been a substantial claim made by Coffman which if uncontroverted would establish the validity thereof and under such circumstances the Special Master was with no more power to act upon the proceedings before him than a Referee in Bankruptcy.

It must necessarily be concluded, then, that the Findings and Conclusions of the Special Master rest upon suspicion, conjecture, and are without any legal evidence sufficient to warrant the making thereof; and that the Specifications of Error assigned by appellant herein to the effect that

the Special Master erred in making his Findings of Fact and Conclusions of Law in the Original and Supplemental Reports, and that the Court erred in adopting the same and making the Order and Judgment appealed from over the Objections and Exceptions of appellant are sustained.

(2) Under Local Law a Court Cannot Order the Payment to a Judgment Debtor of an Indebtedness Alleged to Be Due From a Third Person to a Judgment Debtor.

The general rule is that an indebtedness cannot be ordered paid by a third person under a statute authorizing an order requiring the delivery of "money" or "property" belonging to or under the control of the debtor. (33 C. J. S. *Executions,* Sec. 383, p. 969.)

The Court, under California Code of Civil Procedure, Sec. 719, can order tangibles only to be delivered by the debtor of the judgment debtor toward the satisfaction of the judgment for there is no direct liability in favor of a judgment creditor by third persons indebted to the judgment debtor (Secs. 714 to 721 of the Code Civ. Proc.).

As stated in *Farmers & Merchants Bk. v. Bank of Italy,* 216 Cal. 452 (14 Pac. 527):

> ". . . By the express terms of section 544 persons indebted to the judgment debtor are, upon receiving notice that such debts are attached, made directly liable to the attaching creditor. But no such direct liability is provided for in the sections supplementary to execution. . . .
>
> ". . . It must be remembered that whatever rights appellant may have against respondent exist solely by virtue of statute. The respondent is not indebted to appellant—there is no privity between a judgment creditor and his debtor's debtor. . . ."

Under similar statutory provisions, the law of New York is the same. See *Matter of Delaney,* 256 N. Y. 315, 176 N. E. 457, where the Court, in deciding that a bank holding funds on deposit belonging to the judgment debtor could not be compelled in supplemental proceedings to pay such deposit to a judgment creditor, stated as follows:

> ". . . The money deposited with the bank belongs to the bank and is not the property of the depositor. The property of the depositor is the indebtedness of the bank to it. . . . The debt might have been satisfied under Civil Practice Act, section 792, before the appointment of a receiver under an order *permitting* the payment of the debt to the sheriff. No such order was obtained and no such payment could be *compelled,* although under Civil Practice Act, section 792, the delivery of tangible personal property may be compelled. . . ."

At page 321 the Court continues:

> ". . . The proceedings below have gone on the erroneous theory that the entire indebtedness of the bank to its depositor is a tangible asset of the judgment debtor capable of delivery *in specie* to the receiver and subject to the provisions of the last sentence of General Corporation Law, section 170, which provides for the delivery of such property to the receiver. But the payment of debts must be kept distinct from the delivery of property (Civ. Prac. Act, sections 792, 793) and it appears that the bank never held any tangible property of the insolvent corporation which was capable of physical delivery but was merely indebted to it, subject to the injunction order. Moreover, all rights of property, if their

> recognition is resisted on substantial grounds, . . . must be determined by action and may not be enforced summarily. . . ."

In *Capital City Surety Co. v. DeLuxe Sightseeing Co.*, 233 N. Y. Supp. 126, the same rule is declared, where the Court states as follows:

> ". . . While money on deposit in a bank is commonly considered to be the property of the depositor, the relationship in fact between him and the bank is that of debtor and creditor, and the amount on deposit represents merely an indebtedness by the bank to the depositor. For this reason the provisions of Section 793, Civil Practice Act, requiring delivery of money to the sheriff, where the same belongs to a debtor, but is in the possession of a third party, do not apply and cannot be availed of here. Nor, within the wording of said section, is the money on deposit money belonging to the judgment debtor. . . ."

Under the foregoing principles, therefore, it is manifest that the Court erred in requiring Coffman to pay any sum of money whatsoever to Cobra.

Finally, the very form of the Order made by the District Court requiring Coffman to pay to Cobra the amount of Cobra's judgment against Aircraft Company is erroneous. By the terms of the Order ". . . Harry J. Coffman is ordered to pay to the judgment creditor Cobra Manufacturing Company the sum of $6,254.25 . . ." [R. 124-125]. Such order is an *in personam* order which the law forbids where there is absent the requisite proof of possession of property belonging to the

judgment creditor. To permit such an order would be to subject appellant to imprisonment for an alleged debt contrary to constitutional and statutory enactment.

> *Knutte v. Superior Court,* 134 Cal. 660, 66 Pac. 875.

Conclusion.

We believe that we have demonstrated in this Brief that the Order appealed from should be reversed. That Order rests upon proceedings had before a Special Master upon a judgment either void for want of jurisdiction or unenforceable because it lacked the attributes of a money judgment. The proceedings before the Special Master were not supported by the evidence but were contrary thereto. In adopting the reports of the Special Master and his Findings and Conclusions the trial court made an order against appellant which is against the law both in its substantive and procedural aspects.

Upon the principles, precedents and authorities herein set forth, therefore, it is respectfully submitted that the Order appealed from be reversed.

Reynolds, Painter & Cherniss,

By Louis Miller,

Attorneys for Appellant.

APPENDIX.

California Code of Civil Procedure, Section 717, provides as follows:

> "After the issuing or return of an execution against property of the judgment debtor, or of any one of the several debtors in the same judgment, and upon proof by affidavit or otherwise, to the satisfaction of the judgment, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars ($50), the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same."

California Code of Civil Procedure, Section 719, provides as follows:

> "The judge or referee may order any property of the judgment debtor, not exempt from execution, in the hands of such debtor, or any other person, or due to the judgment debtor, to be applied toward the satisfaction of the judgment; but no such order can be made as to money or property in the hands of any other person or claimed to be due from him to the judgment debtor, if such person claims an interest in the property adverse to the judgment debtor or denies the debt."

California Code of Civil Procedure, Section 720, provides as follows:

> "If it appears that a person or corporation alleged to have property of the judgment debtor, or to be

indebted to him, claims an interest in the property adverse to him, or denies the debt, the judgment creditor may maintain an action against such person or corporation for the recovery of such interest or debt; and the judge or referee may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment. Such orders may be modified or vacated by the judge or referee granting the same, or the court in which the action is brought, at any time, upon such terms as may be just."

California Code of Civil Procedure, Section 684, provides as follows:

> "When the judgment is for money, the same may be enforced by a writ of execution. . . ."